

## CTAP CASELAW UPDATES<sup>1</sup> – NOVEMBER 2007

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### **Planning, Zoning and Subdivision Law**

***Ballas v. Missoula City Board of Adjustments, et al.*** (Montana Supreme Court, 2007 MT 299, on appeal from the District Court of the Fourth Judicial District of Montana, November 19, 2007)

Dismissing appeal of district court's denial of a motion to dismiss plaintiffs' challenge to a common boundary line adjustment between two existing lots and issuance of a building permit for the newly adjusted second lot. The appeal is premature, as there is no interlocutory appeal available from an order denying a motion to dismiss for lack of standing.

### **Takings**

***Crown Point Development, Inc. v. City of Sun Valley, et al.*** (9<sup>th</sup> Circ., on appeal from the United States District Court for the District of Idaho, November 1, 2007)

The plaintiff developer of a multi-family subdivision sued the city for a violation of substantive due process after the city denied its application for a revision to the final phase of its development, claiming the city had no evidence in support of its position. The district court dismissed the complaint based on long-standing Ninth Circuit case law (*Armendariz v. Penman*, 75 F.3d 1311 (9<sup>th</sup> Circ. 1996) and *Macri v. King County*, 126 F.3d 1125, 1129 (9<sup>th</sup> Circ. 1997)) that such claims are preempted by the more specific Fifth Amendment takings claim. The appellate court – in a highly anticipated decision – reversed and remanded, abandoning the *Armendariz* rule in light of the U.S. Supreme Court's recent holding in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532 (2005). After *Lingle*, *supra*, the question of whether or not a governmental action substantially advances a legitimate public purpose – i.e., is arbitrary and capricious – is a claim lying solely in substantive due process and not takings. Quoting *Lingle*, the appellate court noted that “[t]he Takings Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference.”

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## **Sign Regulation**

***Outdoor Media Group, Inc. v. City of Beaumont*** (9<sup>th</sup> Circ., on appeal from the United States District Court for the Central District of California, November 1, 2007)

Partially upholding dismissal of plaintiff billboard company's constitutional challenge to city's sign ordinance. The court held that the city's repeal of the sign ordinance during the litigation mooted the plaintiff's claims for declaratory and injunctive relief, as there was no longer any risk that the plaintiff would be subject to the repealed ordinance. The court also upheld the district court's dismissal of the plaintiff's procedural due process claims, as the company had no vested right to a permit application. However, the court held that plaintiff's claims for damages resulting from the repealed ordinance's infringement of its First Amendment and Equal Protection rights did not require a showing of vested rights. As the ordinance provided narrow, objective, and definite standards to guide the licensing authority in granting sign permits; the legislative purposes of preserving the city's aesthetics and avoiding traffic and safety hazards were legitimate reasons for regulating commercial speech; plaintiff had no standing to bring an overbreadth challenge to the ordinance; and the distinction between off- and on-site advertisers is rationally related to a legitimate governmental interest, no damages were available to the plaintiff on those claims. Because the ordinance limited the communication of noncommercial information, however, and provided only limited noncommercial message exemptions from this ban, the plaintiff had sufficiently stated a claim that the ordinance was an unconstitutional regulation of noncommercial speech, and its damages claims on that point were remanded to the district court.

***Get Outdoors II, LLC v. City of San Diego*** (9<sup>th</sup> Circ., on appeal from the United States District Court for the Southern District of California, November 1, 2007)

Affirming district court's order granting summary judgment to the city in overbreadth challenge to its sign ordinance as unconstitutional regulation of noncommercial speech, an unconstitutional prior restraint, and an impermissible content-based time, place, and manner regulation. The plaintiff billboard company sought permits for 24 new signs at various properties within the city, and sued the city after the applications were denied as "off-premises" signs prohibited under the ordinance. The proposed signs also violated the ordinance's size and height restrictions. During the pending litigation, the city enacted amendments to the ordinance, including a "message substitution" clause, a deadline for reviewing permit applications, and a provision for judicial review.

The appellate court held that a plaintiff bringing an overbreadth challenge must still satisfy the three elements of standing set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992): (1) injury in fact; (2) causation; and (3) redressability. While the denial of the permits on the basis of the ordinance's size and height restrictions would be redressed by a favorable decision and therefore the plaintiff had standing to bring that claim, the appellate court found those restrictions were narrowly tailored to serve the significant governmental interests of traffic safety and aesthetics, and left open ample alternative channels of communication – namely, through signs that fall within the size and height restrictions. Because the plaintiff's proposed signs could be constitutionally denied on that basis, its injuries from the city's alleged unconstitutional regulation of noncommercial speech could not be redressed by a favorable court decision. Therefore, the plaintiff did not have standing as to that claim. Finally, the

appellate court held that plaintiff did not have standing to bring its prior restraint claim, as it had shown no intent that it would ever file permit applications that would comply with the ordinance's constitutional size and height restrictions.

### **Environmental Law**

***California Department of Toxic Substances Control v. Alco Pacific, Inc., et al.*** (9<sup>th</sup> Circ., on appeal from the United States District Court for the Central District of California, November 28, 2007)

Finding defendant companies that sold lead materials to a lead processing facility liable for cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") at the facility. Defendant companies were arranging for the disposal or treatment of hazardous wastes created as by-products of their own facilities, not selling a useful product to the contaminated facility. If a substance has "the characteristic of waste" at the time it is delivered to another party, the deliverer of that substance can be charged with cleanup liability under CERCLA.

### **Real Property Law**

***Fidelity Exploration and Prod. Co. v. United States, et al.*** (9<sup>th</sup> Circ., on appeal from the United States District Court for the District of Montana, November 6, 2007)

Affirming district court's dismissal of oil and gas company's action to quiet title to leased portion of Tongue River bed, as action is time-barred by statute of limitations. When Montana became a state in 1889, it held title to all land that lay under navigable waters except if it had already been conveyed to a private party or was reserved "under federal control for an appropriate public purpose." At the time, the Northern Cheyenne Reservation boundary was 10 miles west of the Tongue River, but the Secretary of the Interior was withholding federal lands between the boundary and the river until the tribe's needs were determined. In 1926, the Northern Cheyenne Reservation boundaries were formally adjusted to "the middle of the channel of the Tongue River," and all "oil, gas, and other natural deposits" within the reservation were reserved for the benefit of the tribe and held in trust by the federal government for the tribe.

In 2002, the state issued seven oil and gas leases to the plaintiff along portions of the Tongue riverbed that overlap with the boundary of the reservation, "subject to any incursion by the Northern Cheyenne Reservation." Because the state was the predecessor-in-interest to the plaintiff prior to issuance of the lease, and the state failed to seek quiet title to the riverbed at the time it became aware or should have been aware that the boundaries of the reservation were set in the center of the riverbed, the 12-year federal statute of limitations on quiet title actions barred the claim.

**Czajkowski v. Meyers** (Montana Supreme Court, 2007 MT 292, on appeal from District Court of the Sixth Judicial District of Montana, November 7, 2007)

Affirming the district court's determination that restrictive covenants (regarding external appearance of secondary structures) were not violated and award of damages to defendants. When the purpose of covenants is to enhance and protect the value, desirability, and attractiveness of the subdivision as a whole, for the mutual benefit of the residents as a whole, the specific provisions of the covenants must be construed to achieve those purposes. Where a guesthouse on one of the properties was built in a similar fashion as the primary structures on surrounding properties, instead of the style of the less-attractive and preexisting primary structure on the same property, the general purpose of the covenants was met and only a *de minimis* violation, if any, had occurred. The court also upheld the damages awards for the plaintiffs' intentional infliction of emotional distress on the defendants, where plaintiffs continually verbally abused and harassed their neighbor defendants over a four-year period.

**Wolf, et al. v. Owens** (Montana Supreme Court, 2007 MT 302, on appeal from the District Court of the Eleventh Judicial District of Montana, November 20, 2007)

Affirming district court's holding that plaintiffs established a prescriptive easement over defendant's property. When originally subdivided, the owner of the property subdivided it into 24 parcels and retained one lot separating the other parcels from the Middle Fork of the Flathead River, selling the other lots to various parties. Those lots eventually ended up with the plaintiffs, while the remaining lot was forfeited by the original owner for failure to pay taxes and eventually acquired by defendant through assignment of a tax sale certificate. For over 30 years, defendant visited the property infrequently, driving across the subdivided parcels to gain access to his lot. At some point an owner of one of the parcels across which the road traversed chained the road and posted a no trespassing sign, after which defendant parked outside the subdivision and walked through it to his property. The neighboring plaintiff property owners claimed that for most of that time they either did not know that defendant owned the property or even that it was owned by anyone. Plaintiffs had been accessing the river through defendant's property for recreational use of the river for 30 years, while at the same time denying defendant the right to cross their properties to reach his parcel.

The court found that plaintiffs had established a prescriptive easement across defendant's property, as their use of the parcel to gain access to the river had been open, notorious, exclusive, adverse, continuous and uninterrupted for the statutorily required five year period. Conversely, defendant had not established either an implied easement by pre-existing use or by necessity, as there was no evidence that any such use was apparent and continuous at the time the tract was divided, and no intention on the part of the original owner to grant the parcel with reservation of an easement across the other parcels.